

Food Litigation Newsletter

February 24, 2014

ISSUE NO. 27

About

Perkins Coie's Food Litigation Group defends packaged food companies in cases throughout the country.

Please visit our website at perkinscoie.com/foodlitnews/ for more information.



This newsletter aims to keep those in the food industry up to speed on developments in food labeling and nutritional content litigation.

Recent Significant Developments and Rulings

Smart Balance Milk Labeling Suit Not Preempted

Koenig v. Boulder Brands, Inc., No. 1:13-cv-01186-ER (S.D.N.Y.): In a putative class action over “fat free” labeling on defendants’ Smart Balance milk products, the court held that nonbinding FDA opinions do not preempt state law claims. Plaintiffs alleged the “fat free” labeling of Smart Balance milk products infused with a blend of omega-3 fatty acids violates the New York General Business Law. Defendants argued that plaintiffs’ suit conflicted with federal law, and was therefore preempted, because FDA guidance documents and advisory opinions for related products showed that defendants’ labeling was compliant with federal regulations. The court denied the motion, reasoning that advisory opinions regarding other products did not control the issue. The court also dismissed plaintiffs’ express warranty and unjust enrichment claims on other grounds, but granted plaintiffs leave to amend. [Order](#).

Mott’s “No Sugar Added” Labeling Lawsuit Narrowed

Rahman v. Mott’s LLP, No. 3:13-cv-03482 (N.D. Cal.): In this proposed class action, the court dismissed claims that Mott’s applesauce is improperly labeled as having “no sugar added” although it allowed claims regarding Mott’s apple juice to proceed. As to applesauce, the court held that the complaint did not plead sufficient facts to show that Mott’s could not label its applesauce as “no sugar added” under governing FDA regulations. As to labeling for apple juice, however, the court concluded that plaintiff had pled sufficient facts to support those claims. The court further held that the complaint properly stated a claim regarding Mott’s apple juice for violation of the “unlawful” prong of California’s Unfair Competition Law. The court dismissed, however, plaintiff’s claims under California’s False Advertising Law, Consumer Legal Remedies Act, the fraud prong of the Unfair Competition Law, as well as plaintiff’s negligent

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misrepresentation claim, for failure to satisfy the heightened pleading standard of Rule 9(b). The court granted plaintiff leave to file an amended complaint as to those claims. [Order.](#)

Court Preliminarily Approves Trader Joe's "All-Natural" Settlement

Larsen v. Trader Joe's Company, No. 3:11-cv-05188-WHO (N.D. Cal.): A federal judge in California recently granted preliminary approval of a settlement of a lawsuit regarding certain Trader Joe's products that had been labeled "all natural." Among other things, the settlement would establish a \$3.375 million settlement fund. [Order.](#)

NEW FILINGS

Sciortino v. PepsiCo, Inc., No. 14-cv-00478 (N.D. Cal.): Plaintiffs allege PepsiCo products lack warnings about the presence a coloring agent, 4-Methylimidazole (4-MEI), in its Pepsi, Diet Pepsi, and Pepsi One soft drinks. Plaintiffs claim that under California's Proposition 65, products containing more than a certain level of 4-MEI must carry a health warning label. On behalf of a putative California class, the complaint alleges California warranty, statutory consumer protection, and product liability claims. [Complaint.](#)

Cortina v. PepsiCo, Inc., No. 3:14-cv-00168-H-JMA (S.D. Cal.): Plaintiff alleges PepsiCo failed to disclose proper information regarding 4-MEI contained in its Pepsi, Diet Pepsi, and Pepsi One soft drinks. The complaint alleges violations of California consumer protection statutes on behalf of a putative class of California consumers. [Complaint.](#)

Cortina v. Goya Foods, Inc., No. 3:14-cv-00169-L-NLS (S.D. Cal.): Plaintiff alleges Goya Foods failed to disclose proper information regarding 4-MEI contained in its Malta Goya soft drinks. The complaint alleges violations of California consumer protection statutes on behalf of a putative class of California consumers. [Complaint.](#)

Miller v. Living Harvest Foods Inc., No. 2014-2735-CA-01 (11th Jud. Cir. Court of State of Florida): Plaintiff alleges that various Living Harvest's Tempt Hempmilk products are misleadingly labeled because they list "evaporated cane juice" as an ingredient instead of sugar. On behalf of a putative class of Florida consumers, the complaint alleges unjust enrichment and violation of the Florida Deceptive and Unfair Trade Practices Act. [Complaint.](#)

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Contacts

David Biderman, Partner

Los Angeles and San Francisco
310.788.3220

Charles Sipos, Partner

Seattle
206.359.3983

Joren Bass, Senior Counsel

San Francisco
415.344.7120

Heikkila v. Suja Life LLC, No. 3:14-cv-00556 (N.D. Cal.): On behalf of a putative nationwide class, plaintiff alleges that Suja Life falsely labels its juice products as “raw.” The complaint asserts various California and federal warranty claims, along with claims for unjust enrichment and violation of California consumer protection laws. [Complaint.](#)

Aguiar v. Merisant Co., No. 14-cv-00670-RGK (AGRx) (C.D. Cal.): Plaintiff alleges defendant falsely advertises and labels its PureVia stevia product as “pure” and “made from ingredients found in nature.” On behalf of a putative nationwide class, the complaint alleges warranty, consumer protection, unjust enrichment, and California statutory claims. [Complaint.](#)

Kopalian v. Ralphs Grocery Co., No. BC533846 (Cal. Super., Los Angeles County): Plaintiff alleges that Ralph’s decaf coffee is mislabeled as “without caffeine,” when it actually contain a small amount of caffeine. The complaint alleges various California consumer protection claims on behalf of a putative class of California consumers. [Complaint.](#)

Shaouli v. Reed’s Inc., No. BC534738 (Cal. Super., Los Angeles County): On behalf of a putative nationwide class, plaintiff claims defendant’s beverages mislead consumers in violation of California law by listing “evaporated cane juice” as an ingredient rather than sugar. [Complaint.](#)

Dossey v. Skinnypop Popcorn LLC, No. CV 526548 (Cal. Super., San Mateo County): Plaintiff alleges that defendant falsely advertises its Skinny Pop popcorn as being a healthy snack that is lower in fat and calories than competing snack foods when it is not. The complaint alleges various California consumer protection claims on behalf of a putative class of California consumers. [Complaint.](#)

Marquez v. Overseas Food Distributors, No. BC 535015 (Cal. Super., Los Angeles County): Plaintiff claims defendant’s “grape seed oil” is falsely labeled because the product allegedly contains less than 25% grape seed oil. On behalf of a putative nationwide class, the complaint alleged various California statutory and common law claims. [Complaint.](#)